No. 323

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

JOE W. BUICE, *Petitioner*

v.

COLONEL HOWARD S. PATTERSON ET AL.,
Respondents

□

Petition for Writ of Certiorari to the United States Circuit Court of Appeals to the First Circuit.

ALFRED A. ALBERT
HAYDEN C. COVINGTON
Counsel for Petitioner

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TO THE SUPREME COURT OF THE UNITED STATES:

Joe W. Buice petitions this Court for a writ of certiorari. He shows unto the Court as follows:

1. *Opinions of the courts below.*

The opinion of the district court is unreported. A memorandum decision was rendered and filed. It appears in the record. [8]* The opinion of the United States Circuit Court of appeals is reported at F. 2d , and also appears in the record. [15-22]

2. *Jurisdiction.*

The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

* Bracketed figures appearing in this petition and the supporting brief refer to pages of printed transcript of the record.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered May 20, 1946. [22] Time to file a petition for rehearing is three months from that date. Petition for writ of certiorari is filed within the prescribed time.

4. *Statutes and Regulations involved.*

The statutes implementing the right to the writ of *habeas corpus,* 28 United States Code, sections 451-464; Selective Training and Service Act of 1940, as amended (50 U. S. C. App. §§ 301-318), sections 5 (d) and 11; Selective Service Regulations, sections 601.7, 601.8, 622.44, 633.2, 633.21; Articles of War, Articles 2 and 109; War Department Mobilization Regulations 1-7, Par. 13 (e), are all involved.

5. *Questions presented.*

(1) Where the district court issued a show cause order to which the respondents appeared, produced petitioner, and the court summarily inquired into the allegations and facts to determine whether the writ of *habeas corpus* should issue, is the district court bound to assume to be true the facts alleged in the petition and testified to by petitioner, because the sufficiency of the evidence and credibility of petitioner were not in issue at the hearing?

(2) Did the holding of the trial court that the petition for the writ of *habeas corpus* should be dismissed because petitioner's testimony "at this late date and unsupported by other evidence, is not sufficient to warrant a finding that he was never inducted into the military service" prejudice petitioner and deny him his right of the writ of *habeas corpus*?

(3) Did the trial court entirely disregard the undisputed evidence and arbitrarily refuse to issue the writ of *habeas corpus* so that the case could properly be heard upon the merits?

(4) Treating the case as though the writ of *habeas corpus* had issued and a regular hearing then had on a return of the writ, under all the circumstances of the case, did the district court err in holding that petitioner's testimony was unbelievable and insufficient to support an order granting the writ of *habeas corpus*, solely on account of the delay of petitioner in bringing the petition for the writ of *habeas corpus*?

(5) In *habeas corpus* proceedings, where there is no impeachment discrediting or contradicting petitioner's testimony, is it necessary to produce witnesses, who are adverse and under the control of respondents, to corroborate the testimony of petitioner?

(6) Did the court below err in holding that, in *habeas corpus* cases, it was bound by the finding of the trial court and that it had no authority to examine the evidence and make its own independent findings thereon?

(7) Is the finding of the trial court unsupported by any evidence and contrary to the undisputed evidence showing that the armed forces do not have jurisdiction over petitioner?

Statement of Case

FORM AND HISTORY OF ACTION

This civil action was instituted in the district court by petition for writ of habeas corpus to obtain release of Joe W. Buice from the custody of respondents. [2-5] It was alleged that Buice was illegally restrained of his liberty because of his reporting to the induction station as commanded by an order to report for induction issued by a local selective service board at Kingsville, Texas, providing that he report on November 22, 1942. [3] It was alleged that the armed forces of the United States and respondents did not have jurisdiction over Buice because he never submitted to induction at the induction station.

It was alleged that he refused to undergo the ceremony of induction. [3] It was further alleged that he refused to do training and service and in any way comply with the regulations of the armed forces, resulting in his being court-martialed and imprisoned therefor. [4]

Upon presentation of the petition for writ of *habeas corpus* to the district court, the respondents were summonsed to show cause why the writ of *habeas corpus* should not issue as prayed for in the petition. [5-6] The summons to show cause was duly served. [6] On July 30, 1945, the respondents appeared in compliance with the summons to show cause and thereupon a hearing was had on wh ther the writ should be granted or dismissed. [7]

FACTS

Joe W. Buice testified in his own behalf.* He was 23 years of age at the time of the trial. [8] In 1942 he resided in Kingsville, Texas, where he registered with Selective Service Local Board No. 1. [8] In his questionnaire filed with the local board he showed that his occupation was that of an ordained minister of Jehovah's witnesses, having been trained for such ministry by his father and mother who had been Jehovah's witnesses since before he was born. These facts were called to the attention of the local board. [8] Buice was classified in Class I-A as liable for training and service. The local board and the board of appeal denied his claim for exemption as a minister of religion. [9] Being classified as liable for training and service in the armed forces, he was ordered on November 2, 1942, to report on November 22, 1942, at the local board in Kingsville, Texas. [9] He went through the usual processing given by the armed forces to selectees, including the physical examination to determine his acceptability. [9] He

* The evidence is undisputed. There was no conflict in the testimony. Therefore no issue of fact was raised. The evidence presented only a question of law.

was found mentally and physically acceptable. The army accepted him for training and service. [9]

Buice was requested to go through the induction ceremony in the room designated for that purpose. Upon entering the room, he went to the desk of the officer in charge, gave his name and stated that he would refuse to submit to induction by taking the oath, which was the ceremony then prescribed to consummate induction into the armed forces. [9] The officer informed him that, although they could not compel him to take the oath, he was in the army anyway, regardlesss of whether he submitted to the induction ceremony by taking the oath. [9] When the ceremonial oath was given to the group, although Buice was in the same room, he stood aside from the rest of the group and refused to take the oath. [9] The oath was not administered to him nor was he asked to take it. He did not sign any papers with respect to allotment of his pay to relatives as a member of the armed forces. He did not name any beneficiary in the war risk insurance papers. He signed a statement to the effect that he wanted no insurance. [9]

After Buice had completed the processing and had refused to undergo the ceremony of induction, he was granted a furlough, told to go home and return on December 2, 1942. [9] On that date he returned to Fort Sam Houston. Immediately after his arrival he talked to the officer in charge, informing him that he was not subject to military jurisdiction because he did not take the oath and he would never take the oath of induction. [9] The officer in charge informed him that he was in the army in spite of the fact that he had refused to undergo the induction ceremony. [9]

Buice was assigned to a company where he was not asked to do anything. He refused to salute any officer of the armed forces. [9] Although he signed for a uniform, he refused to do any training and service. [10] Buice

accepted no pay. He took no insurance. He asked for no allotments. [10]

Afterward at Fort Sam Houston, he was ordered to go to Salt Lake City for training and service. He refused to go. [10] His refusal brought him, the next day, before his commanding officer, Colonel Gotshaw. [10] During a two-hour conference Buice fully explained his position, as one of Jehovah's witnesses refusing to do training and service, to the colonel. He told the colonel he did not consider himself to be in the army or subject to army jurisdiction. [10] Colonel Gotshaw ordered him to salute him as the army regulations required. Buice refused and was ordered back to the company by the colonel. [10]

Upon refusal to obey a later order of the commanding officer to work he was court-martialed. At the court-martial hearing the issue was raised that he was not subject to military jurisdiction because of his refusal to take the oath or undergo the induction ceremony. [10] Other defenses were urged. [10] His defenses were overruled and he was adjudged guilty as charged. A sentence of six months was imposed, which he served at Fort Sam Houston, Texas. Upon his release from the guard house, he was sent to Dodd Field. [10] Immediately upon arrival he sought Colonel Gotshaw, who demanded that he salute him. [10] Buice refused and was sent back to his company. [10] The colonel informed him that his release from the Eighth Service Command would be sought. [10]

After his return to Dodd Field he refused to do any training and service. Each day he would leave the field and go to San Antonio where he performed his missionary evangelistic work as one of Jehovah's witnesses. [10] No further action or court-martial proceedings were taken against him for his refusal to do training and service, and salute superior officers. [10] He refused to go to Camp Barkley at Aberdeen, Texas, when ordered to transfer. He was taken into custody and transported against his

will and by force to Camp Barkley. Immediately upon his arrival there he deserted the camp. He stopped wearing the army uniform after desertion and obtained civilian clothing. He went to Cleburne, Texas, where he remained for a year. [10] While at Cleburne, he engaged in the full-time missionary evangelistic work of Jehovah's witnesses as a minister of religion. [10] From Cleburne he changed his field of missionary work to the State of Tennessee, where he continued to carry on his full-time pioneer missionary evangelistic work as one of Jehovah's witnesses. He continued in his work in Tennessee until June 1945 when he was apprehended by an agent of the Federal Bureau of Investigation who took him into custody. Upon his arrest, he protested that he was not in the army because of his refusal to take the oath and undergo the induction ceremony. He stated that he told the officer that the oath had never been administered to him. [10-11]

During the latter part of June 1945, having been surrendered to the custody of the armed forces, he was taken to Camp Edwards in Massachusetts. On his arrival there, he protested to the commanding officer that he was not in the army and that the armed forces did not have jurisdiction over him. At Camp Edwards, he refused to take training and service. The only clothes that he wore at Camp Edwards were dungarees. The clothes that he had on at the time of the hearing in the district court were issued to him for the purpose of coming to Boston for the hearing. While at Camp Edwards, he went through an infiltration course, that he was ordered to take, without objection. The infiltration course involved military tactics and the use of fire arms.*

* At the close of petitioner's testimony, the Government presented no witnesses, thus ending the summary hearing.

How Issues Raised

The issues were raised by the petition for writ of *habeas corpus* and the order of the court below dismissing the writ. [2-5, 7, 8-11]

Specifications of Error

1. The trial court erred in dismissing the petition for writ of *habeas corpus.*

2. The trial court erred in overruling the motion for new trial.

Reasons Relied on for Granting the Writ

The holding of the court below that there was a waiver of the right to challenge the jurisdiction of the armed forces through petitioner's refusal to take the oath of induction, under the circumstances in this case, presents a decision that is directly in conflict with the holding of this Court in *Billings* v. *Truesdell,* 321 U. S. 542. Moreover, the decision of the court below is in direct conflict with *Ex parte Yost* (DC-Cal.) 55 F. Supp. 768; *United States* v. *Flynn,* 54 F. Supp. 889; and *In re Herman,* 56 F .Supp. 732, 734.*

The decision of the court below is in direct conflict with *Lawrence* v. *Yost,* decided June 27, 1946, by the United States Circuit Court of Appeals for the Ninth Circuit. In the *Yost* case the facts were similar to but weaker than the facts in the *Buice* case. There Yost failed to inform the officer in the induction room that he would not be inducted or had not taken the oath. Here Buice did that very thing. In the *Yost* case there was testimony by officers of the Army that knew nothing of his refusal to be inducted.

* Cf. *Smith* v. *Richart* (ED-SC) 53 F. Supp. 582, in which case the facts were substantially the same as in the case at bar insofar as his return following the furlough granted after his examination and acceptance at the induction station constituting a waiver of his right. After

If the facts in this case are held to be distinguished from the facts in *Billings* v. *Truesdell, supra,* and thus it is stated that there is no conflict in the decisions, petitioner then asserts that the question as to when, where and how one waives his rights to challenge the want of jurisdiction of the armed forces after the Army takes him into custody upon his refusal to submit to induction, is an important question of federal law which has not been, but which should be, decided by this Court.

Obedience to orders under the threat of penalties by court martial constitutes compulsion which prevents a waiver of the want of jurisdiction. *Hartwell* v. *United States* (CCA-5) 107 F. 2d 359, 360; *United States* v. *Dashiel,* 3 Wall. 688, 697-702.

The holding of the court below that it was precluded by the Rules of Civil Procedure from examining into the evidence in *habeas corpus* cases is in direct conflict with the decisions of this Court. *In re Neagle,* 135 U. S. 1, 42; *Ex parte McCardle,* 73 U. S. 318; and *Kassin* v. *Mulligan,* 295 U. S. 396.

Finality as to findings of a trial court in *habeas corpus* proceedings, is confined to instances where there is a dispute of fact or contradiction in the testimony. *O'Keith* v. *Johnston* (CCA-9) 129 F. 2d 889, 891, cert. den. 317 U. S. 680, reh. den. 317 U. S. 711, 318 U. S. 798.

The court below was in as good a position as was the trial judge to determine the facts and draw inferences of fact because evidence was undisputed. The decision of the

(*Concluded from preceding page*)

the decision of this Court in *Billings* v. *Truesdell,* 321 U. S. 542, on appeal to the Fourth Circuit Court of Appeals in *Smith* v. *Richart, supra,* the Government stipulated to a reversal and a discharge of Smith who had refused to take the oath and to do training and service after his return from the furlough granted by the armed forces. See *Smith* v. *United States,* 148 F. 2d 288. *Contra, Mayborn* v. *Heflebower* (CCA-5) 145 F. 2d 864, cert. den. 325 U. S. 854.

court below to the contrary is in conflict with *Social Security Board* v. *Warren* (CCA-8, 1944) 142 F. 2d 974; *Walker* v. *Altmeyer* (CCA-2, 1943) 137 F. 2d 531; *Williams* v. *United States* (CCA-7, 1942) 126 F. 2d 129, cert. den. 317 U. S. 655; *Carroll* v. *Social Security Board* (CCA-7, 1942) 128 F. 2d 876.

The interest of the petitioner in the result of the petition is not sufficient to raise a question as to his credibility so as to justify a summary dismissal of the petition for writ of *habeas corpus,* because the testimony was not contradicted by direct evidence or legislative inferences, it was not opposed to probabilities. In its nature, petitioner's testimony was not suspicious or surprising. There was no reason for denying the conclusiveness of his evidence. The decision of the court below that the interest of petitioner under the circumstances was sufficient to raise an issue of fact for the decision of the trial court is in conflict with *Mack* v. *Dailey* (CCA-2) 3 F. 2d 534, 538-539; *Burdon* v. *Wood* (CCA-7) 142 F. 2d 303, 305; *Mass. Protective Ass'n* v. *United States* (CCA-1) 114 F. 2d 304, 309.

In the event that the Court fails to find a conflict in the decision of the court below with the decisions of the other circuit courts of appeals, then petitioner says that there is presented an important question of federal law which has not been, but ought to be, decided by this Court, namely, Is there an exception to the general rule that the interest of a party is sufficient to raise the issue of his credibility where his testimony is not contradicted by direct evidence or legitimate inferences, is not opposed to probabilities and is not suspicious? Cf. *Hull* v. *Littauer* (1900) 162 N. Y. 569.*

* Followed in *Kelly* v. *Burroughs* (1886) 102 N. Y. 93; *Armstrong* v. *Boomansour* (1928) 223 A. D. 511, aff'd 1929, 252 N. Y. 590. See also 72 A. L. R. 27.

This exception to the general rule ought to be recognized so as to protect against a court's rejecting undisputed evidence of a party which is unimpeached, especially where the respondents fail to produce evidence. The failure to produce evidence within a party's power to produce raises a presumption that the testimony would be adverse to such party. It was within the power of respondents to produce the officers at the induction station to testify whether petitioner refused to take the oath of induction. An inference could be drawn from this failure to support the uncontradicted testimony of petitioner so as to preclude a dismissal of his petition for the writ of *habeas corpus* because his testimony was uncorroborated.

The courts below have decided an important question of federal law, which has not been decided, but which should be decided, by this Court. That is, May a petition for writ of *habeas corpus* be dismissed and the petitioner's uncontradicted testimony be discarded solely because the *habeas corpus* proceedings came at a "late date", being instituted in July 1945, almost three years after jurisdiction was claimed over petitioner by the armed forces?

Another question of federal law of importance which has not been decided, but which ought to be decided by this Court is presented here: Is the sufficiency or credibility of the petitioner's testimony upon a hearing of a show cause order, rather than upon a writ of *habeas corpus,* permitted to be drawn in question, where the respondents do not deny any of the allegations and the petitioner was not warned by the court that his credibility, because of his interest in the proceedings and delay in bringing the writ, would be raised? Allegations of material facts in a petition for writ of *habeas corpus,* not denied by the respondent, are usually deemed admitted upon a hearing. *Hammerer* v. *Huff* (CCA-DC) 110 F. 2d 113, 114-115.

The most that could be considered raised was whether a *prima facie* case was shown in the facts alleged and in

the facts proved upon the hearing of the show cause order. *Ex parte Quirin,* 317 U. S. 1, 24; *Walker* v. *Johnston,* 312 U. S. 275, 284.

The action of the courts below in denying petitioner his full hearing by a writ of *habeas corpus* and a discharge, constitutes such a drastic departure from the usual and accepted proceedings in *habeas corpus* cases as to call for an exercise of this Court's power and supervision to halt the same. This case calls for the exercise of this Court's supervisory power under the statute and the rules of this Court.

Conclusion

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit directing such court to certify to this Court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of the district court, be set aside and petitioner be ordered discharged from custody of respondents or, in the alternative, that the judgment be reversed and the cause remanded for a new trial not inconsistent with this Court's opinion; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

JOE W. BUICE, *Petitioner*

By ALFRED A. ALBERT

HAYDEN C. COVINGTON

Counsel for Petitioner

SUPPORTING BRIEF

Preliminary

For a statement as to the opinions of the courts below, the basis which the jurisdiction of this Court is claimed, the questions presented, the history of the action, how the issues were raised, the evidence received and rejected and the assignments of error relied upon, reference is here made to the foregoing petition for writ of certiorari.

ARGUMENT

ONE

It was error for the trial court to dismiss the petition for writ of *habeas corpus* because a *prima facie* case entitling petitioner to the issuance of the writ of *habeas corpus* was shown by the allegations of the petition and the undisputed testimony of petitioner.

While it is not improper for the trial court to issue the show cause order and holding a preliminary hearing thereon to determine if a *prima facie* case was shown upon the allegations and testimony (*Ex parte Yarbrough,* 110 U. S. 651, 653; *Walker* v. *Johnston,* 312 U. S. 275, 283, 284) it was highly improper for the trial court to decide the case upon the merits by holding petitioner's story incredible and dismiss the petition. Upon a preliminary hearing on a show cause order the only question for the court to decide is whether a *prima facie* case is made in the allegations and proof. *Kelly* v. *Duke Power Co.* (CCA-4) 97 F. 2d 529; *Rarick* v. *Board of Comm'rs,* etc. (CCA-5) 27 F. 2d 377; *Tur* v. *Geo. A. Fuller Co.* (CCA-4) 30 F. 2d 30; *Gleason* v. *Thaw,* 234 F. 70, cert. denied 243 U. S. 656; *Northern Pac. R. Co.* v. *Charless* (CCA-2) 51 F. 562.

The court below condemned the procedure of the district court in this case but held that since there was no objection thereto the petitioner waived any right to complain. [16-17]* The court below said: "Under the circumstances here disclosed possibly counsel for the respondents could have made a valid objection, but in the absence of objection by counsel for the petitioner, we see no reason why the latter should be given another opportunity to litigate the merits." [17]

The petitioner had no opportunity to object to the procedure. He was in quest of the writ of *habeas corpus* for the purpose of obtaining his discharge. The trial court had not granted the writ. The show cause order was issued. The respondents appeared producing the petitioner but did not file an answer controverting the allegations in the petition. Therefore when the cause proceeded to a hearing, petitioner had no reason on earth to believe that his contentions raised in the petition were controverted. Petitioner had every reason in the world to believe that the trial court was holding a preliminary hearing to ascertain whether petitioner had a *prima facie* case.

There is nothing in the record to indicate that the court was treating the case as though the writ of *habeas corpus* had issued. There is no stipulation between the parties that the case could be treated as though the writ had issued and waiving the necessity of filing of a return or traverse thereto. The court shows that what happened was that the trial court summarily held a hearing upon the merits without warning the petitioner that his credibility would be put in issue and without informing him that it would be necessary for him to bring witnesses.

If the court had issued a writ, the respondents would have been required to file a return. In the return the po-

* It is to be observed that the court below erroneously stated, contrary to the record, that petitioner "initiated the procedure adopted in the court below." [16]

sition of respondents would have been made clear. It is altogether possible that if respondents were forced to file a return based on the army records in Buice's case, the respondents may have admitted that petitioner did not submit to the oath of induction. The court has no benefit of knowing what the records of the armed forces in the custody of respondents show. Therefore the trial court should have issued the writ of *habeas corpus* so as to require the respondents to make their position clear. If, on the return, the respondents had stated that the petitioner had actually submitted to induction by taking the oath, or if the respondents denied that petitioner had taken the oath, petitioner would have been put on notice that it was necessary for him to get witnesses.

However, when he went to a hearing on the show cause order, he had no notice whatever of what the defenses of the respondents were. Indeed, from the record it is apparent that at no time during the hearing did respondents state their contentions to the court or the grounds on which they were holding petitioner. For all petitioner knows the respondents may have admitted that they were holding him in spite of the fact that he did not take the oath because of his alleged waiver. The petitioner does not know to this day whether respondent claims he is being held because he failed to take the oath or because of the alleged waiver.

The very least that the trial court could have required the respondents to do, so as to enable petitioner to prepare his case, would have been to require respondents to file some sort of pleading under oath showing the grounds for holding petitioner.

One of the rights of a petitioner upon the writ of *habeas corpus* is to know the precise grounds on which he is being detained. To this day, Buice has not been informed, by any pleading or statement made by respondents or their counsel in the trial court, as to the grounds of his detention. How-

ever, the trial court heard the evidence and decided the case upon the merits.

The court below would make it appear that the type of hearing held was initiated by the petitioner and that the petitioner was satisfied with the hearing upon the merits. It should be remembered that petitioner had at all times complained of the order of the court dismissing the petition for the writ. It is from this order that he appealed. The court below states that petitioner did not complain of the type of hearing granted him. The fact is that petitioner has at all times complained of the order of the district court dismissing the petition for the writ. Also petitioner has at all times asserted that the trial court had no business disregarding his testimony upon the hearing of the show cause order.

The power of the district court on the hearing of the show cause order was limited to a determination of whether a *prima facie* case was alleged or could be proved by petitioner. If petitioner testified to facts which constituted a *prima facie* case upon the hearing of the show cause order, in the absence of a stipulation that the case may be considered upon the merits as though the writ of *habeas corpus* had issued, all facts alleged and testified to upon the preliminary hearing must be admitted for the purpose of a decision. Especially is this true where, as in this case, the respondents never filed any answer, response or return. Moreover, there was no denial of any of the allegations contained in the petition. Under such circumstances the allegations of the petition and the uncontradicted testimony of petitioner must be deemed to be conclusively admitted. *Hammerer* v. *Huff* (App. D. C.) 110 F. 2d 113, 114-115.

Were the rule otherwise in a preliminary hearing upon the show cause order, a prisoner could be taken unawares and be put to a hearing without knowing what proof he would be required to meet or what the grounds of his detention were. As before stated, upon a hearing of a writ,

a return and a traverse thereto, a prisoner would have notice of what proof he would be required to meet and what he would have to overcome or on what points he would have to obtain corroborative evidence. He would have an opportunity to produce witnesses. Who knows that upon the cross-examination of the witnesses produced by the respondents petitioner may have been able to establish that he did not take the oath of induction?

The failure of the petitioner to object at the time the hearing was had in the district court does not constitute a confession of judgment or a waiver of the right to the writ of *habeas corpus*, of the right to know what proof he would be called upon to meet, of the right of cross examination of adverse witnesses, of the right to have a return made in response to the petition for writ of *habeas corpus* in order that he might know what the issues were.

It could be presumed that the petitioner thought that the trial court was conducting a preliminary hearing, which it was his right to do, in order to determine whether a *prima facie* case was shown. Petitioner could assume that upon a preliminary hearing to determine whether a *prima facie* case existed the evidence would be tested according to the rule of a demurrer to the evidence. He could assume that the sufficiency of his testimony or his credibility would not be put in issue.

In a preliminary hearing upon a show cause order the court must assume all of the allegations of the petition to be true. Also upon such hearing when a preliminary inquiry is made into the petitioner's testimony to ascertain whether a *prima facie* case exists, the same and familiar rule of a demurrer to the evidence should be applied. The only question for the trial court to decide is whether the testimony offered by the petitioner was legally sufficient, assuming it to be true. It was wholly premature for the trial court to inquire into the sufficiency of the evidence and determine the credibility of the petitioner.

The petitioner has suffered a very unfair advantage. His petition has been dismissed although a *prima facie* case has been shown. He has been remanded to custody without even having had the right to know what the evidence of his adversary was. It may well be that upon a hearing, the respondents' evidence would have corroborated the testimony of petitioner on the issue of whether he actually submitted to induction, which he declared under oath that he did not do.

It was highly irregular for the trial court to dismiss his petition because his testimony was unbelievable without at least calling upon the respondents to show what their beliefs were about the petitioner's credibility. The failure of respondents to file a return raises the presumption that the records of the armed forces show that petitioner did not take the oath and that he did not submit to induction.

It seems plain, therefore, that the court below committed equally as grave an error as did the trial court, when, by its rationalizing, an attempt was made to approve a procedure which was highly irregular. To say that petitioner waived his right by consenting to the hearing is factitious and specious. There was little, if anything, that petitioner could do about it. He was not running the district court. His lawyer was trying to prove a *prima facie* case. It would be highly irregular for his lawyer to object to a hearing when it was the duty of the lawyer, upon the hearing, to establish a *prima facie* case.

The court dismissed the petition. The petitioner did all that he humanly could do, and that was to appeal from the decision dismissing the petition. The fact that he did not object to the hearing certainly is no ground for saying that thereby he consented to the reasons announced by the court for its erroneous decision. This is a new theory in the law which, if sustained, will obscure many pitfalls and traps in *habeas corpus* proceedings and frustrate the efforts of prisoners to get a full hearing upon writs of *habeas corpus*.

TWO

Considering the case as though there was a hearing upon a writ of *habeas corpus*, a return and a traverse, the trial court erred in holding that the delay in bringing the petition for the writ and failure to offer corroborating witnesses to support testimony warranted the dismissal of the petition.

The trial court summarily discarded the uncontradicted testimony given by petitioner because the filing of the petition and the giving of the testimony "at this late date . . . unsupported by any other evidence, is not sufficient to warrant a finding that he was never inducted into the military service." [8, 19]

It is to be observed that the trial court placed great weight for disbelief of petitioner's testimony, because it came "at this late date." The assigned reason for denial of the writ—petitioner's tardy filing of his petition—is factitious and specious. The conclusion reached by the trial court that petitioner waited from November 1942 to July 1945 to complain of the want of jurisdiction is clearly in defiance of the undisputed evidence established by testimony that cannot be impeached.

Buice was reasonably prompt in bringing the petition for writ of *habeas corpus* after he was taken into custody. It was not reasonable to suppose that he should have applied for the writ on the ground that the armed forces did not have jurisdiction over him before he was taken from Dodd Field to Camp Barkley at Aberdeen, Texas. From December 2, 1942, to the date that he completed the service of his six months' court-martial sentence at Fort Sam Houston, Texas, it is not shown that he had an opportunity to apply for a writ of *habeas corpus*. Up to that time he had not done anything in the way of training and service

that was the least bit inconsistent with his claim that the armed forces did not have jurisdiction over him. He had refused training and service. Repeatedly he had refused to salute his superior officers during all of this time.

After release from imprisonment, having served his sentence imposed by court-martial, he returned to Dodd Field, but his return was pursuant to orders, and that could not reasonably be claimed to be a waiver. There was no need for him to apply for a writ of *habeas corpus* then. He had no need of release from custody because the armed forces at Dodd Field did not assume custody over him. He refused to do training and service. His entire time was devoted to carrying on his missionary evangelistic work at San Antonio while he was staying at Dodd Field. It was not until he was forcibly taken to Camp Barkley at Aberdeen, Texas, that it was necessary for him to apply for a writ of *habeas corpus*. However, instead of applying for the writ, he "deserted". Not being in the custody of the armed forces, because of "desertion", there was no necessity to apply for a writ of *habeas corpus*. His freedom gained by "desertion" of the armed forces at Camp Barkley in 1943 continued until he was apprehended by the agent of the Federal Bureau of Investigation in Tennessee during June 1945.

He apparently applied for the writ of *habeas corpus* as soon as he was taken to Camp Edwards in Massachusetts after having been placed in the custody of the armed forces. His petition was filed July 9, 1945. There was barely one month's delay in the filing of the petition. There was no need to file the petition for writ of *habeas corpus* until he was actually held in restraint. Theretofore he had his liberty, even though obtained by "desertion". It necessarily took some time to locate friends and lawyers to assist him after being moved into a strange territory. He was a nonresident and stranger in Massachusetts. He was not acquainted with anyone in the State at the time he was

taken there. It appears that his action in petitioning the court for a writ of *habeas corpus* was very prompt under all the circumstances after he was actually taken into custody in June 1945.

The trial court summarily discarded the uncontradicted evidence given by Buice because "coming at this late date and unsupported by other evidence, is not sufficient to warrant a finding that he was never inducted into the military service." [8] It is submitted that the proof was so indisputable that a refusal to find that the armed forces lacked jurisdiction because of petitioner's refusal to undergo the induction ceremony was an entire disregard of the evidence and showed an arbitrary disposition of the trial court not to consider the case upon the merits.

"Where the material evidence from the lips of unimpeached witnesses is non-conflicting and could lead honest, disinterested, and reasonable men to but one conclusion, there are no factual matters to be resolved . . . Such facts await only a court to announce their effect in law. *Penn. R. R.* v. *Chamberlain,* 288 U. S. 333." (*Burdon* v. *Wood,* CCA-7, 142 F. 2d 303, 305) In the decision just quoted from, the action was for wrongful death from shooting. The defendant contended that he shot in self-defense. The court of appeals held that, although the defense depended almost entirely on the testimony of the defendant who was an interested witness, such defense was established as a matter of law. Cf. *Mass. Protective Ass'n* v. *United States* (CCA-1) 114 F. 2d 304, 309, reversing a judgment of the district court rendered in favor of defendant upon a trial to the court without a jury.

The illegal and injudicious action of the trial court in this case is identical to that condemned in *Fong Tan Jew ex rel. Chin Hong Fun* v. *Tillinghast* (CCA-1) 24 F. 2d 632. There the trial court rendered judgment for the defendant after hearing the plaintiff and two of his witnesses. In reversing the judgment, this Court said: "This record

shows, as a whole, failure to exercise their great power 'under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race.' *Kwock Jan Fat* v. *White*, 253 U. S. 454, 464."

In reaching its conclusion the trial court undoubtedly relied upon the proposition that if the testimony is from a party to the action upon an issue to be determined, his interest "in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (*Sonnenthiel* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408) This quotation reflects the general rule.

The rule is of quite general application and is to the effect that the testimony of a party, or an interested witness, does not conclusively establish the fact testified to, although there is no evidence directly contradictory thereto, since the credibility of the testimony of such a witness presents a question of fact for the court or jury. The general rule, however, with the exception of a few jurisdictions, notably Massachusetts,* is subject to so many exceptions that it is deprived of any actual force.

The general rule that the testimony of a party does not conclusively establish a fact, although uncontradicted, is confined to instances where the testimony of the party is inconsistent with other evidence, contrary to probabilities, or the testimony of the party is itself inconsistent. In almost every one of the cases where the general rule has been referred to, it will be found to have been applied only in instances where the testimony of the interested witness,

* Perhaps the judge of the trial court was applying the Massachusetts rule. *Merchants Nat'l Bank* v. *Haverhill Iron Works*, 1893, 159 Mass. 158; *Bloom* v. *Nutile-Shapiro Co.*, 1923, 247 Mass. 352; *Hutchinson* v. *Converse*, 1911, 208 Mass. 97. It should be observed that the Massachusetts rule is contrary to the prevailing weight of authority in all of the other states as well as the rule adopted in the federal courts, which is herein stated.

while not directly contradicted, was nevertheless inconsistent with other portions of his testimony, with other evidence, or with the natural probabilities, or where the conduct or attitude of the witness was such as to cast suspicion upon his credibility.*

The decisions on this subject have been collated by an annotator. (72 A. L. R. 27) The federal courts, having occasion to express their opinions upon the conclusiveness of the testimony of an interested witness, have adopted the rule that the interest of the witness does not alone present a question of fact or a question as to the witness' credibility when the testimony is uncontradicted, is not open to reasonable doubt, is not surprising and is not open to suspicions. (*Epremiam* v. *Ward,* 1909, 169 F. 691, 696, C. C. N. D. N. Y.) "We fail to discover in the facts and circumstances of this case any reason for sending it to the jury. The evidence of the plaintiff, showing that he took the note for value, before maturity, and without notice of facts from which bad faith could be inferred, is uncontradicted. Under such circumstances the plaintiff was entitled to the direction of a verdict in his favor." *Mack* v. *Dailey,* CCA-2, 3 F. 2d 534, 538-539.

The rule generally applied in most of the courts is stated in *Hull* v. *Littauer,* 1900, 162 N. Y. 569: "Generally, the credibility of a witness, who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. If the evidence is possible of contradiction in the circumstances; if its truthfulness, or accuracy, is open to a reasonable doubt upon the facts of the case, and the interest of the witness furnishes a proper ground for hesitating to accept his statements, it is a necessary and just rule that the jury should pass upon it. Where, however,

* It should be observed that the trial court did not indicate that Buice's testimony was inconsistent or that his attitude was such as to cast suspicion upon his credibility.

the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness. . . . In *Lomer* v. *Meeker*, 1862, 25 N. Y. 361, where the indorser of a note testified to facts showing the exaction of usury, and his testimony was not contradicted, it was held to have been the duty of the court to direct a verdict for the defendant. The court said, 'It is a mistake to suppose that, because the evidence comes from the defendant after the plaintiff had rested, the case must go to the jury. . . . The argument is that this could not properly be done, because there was a question of credibility raised in respect to the witness . . . who proved the usury. But this objection was untenable. The witness was not impeached or contradicted. His testimony is positive and direct, and not incredible upon its face. It was the duty of the court and jury to give credit to the testimony.'" [1]

The court below cannot permit the trial court to obscure the facts from it under the rule of alleged finality of findings of fact so as to preclude it from discharging its judicial function under the *habeas corpus* act.[2] From time immemorial it has been uniformly the rule applicable in this Court and in the courts of appeals to inquire into the facts and render such judgments as should be rendered by the

[1] Followed in *Kelly* v. *Burroughs*, 1886, 102 N. Y. 93; *Armstrong* v. *Boomansour* (1928) 223 A. D. 511, affirmed 1929, 252 N. Y. 590. See also 72 A. L. R. 27, *supra*.

[2] It should be observed that the trial court filed no findings of fact. Whether this was oversight is not clear. The court below said that the rules requiring the making of findings of fact were not applicable in *habeas corpus* cases. [21] Yet, almost in the same breath, the court below said that the same rule applied so as to preclude the court of appeals from setting "aside findings of fact made by a district court in a habeas corpus case". [19]

trial courts in *habeas corpus* cases. *In re Neagle*, 135 U. S. 1, 42; *Kassin* v. *Mulligan*, 295 U. S. 396.

The prerogative and province of this Court in *habeas corpus* cases, as announced in those decisions, have not in the least been impaired by the Rules of Civil Procedure. The Rules of Civil Procedure certainly did not impair or take away the rights of the free people of this country under the *habeas corpus* statutes. The court below confused this rule with the exception to the rule.

Ever since the rule allowing the appellate court to inquire into the facts of a *habeas corpus* case, the exception thereto has been recognized. The exception is that where a dispute of fact is presented before the trial court in *habeas corpus* proceedings, then the finding of the trial court is binding upon the courts of appeals and cannot be set aside. *O'Keith* v. *Johnston* (CCA-9) 129 F. 2d 889, 891, cert. den. 317 U. S. 680, reh. den. 317 U. S. 711, 318 U. S. 798.

However, the exception does not apply here because there is no dispute of fact. The petitioner's testimony was not contradicted. It was not contended that he lied. The only ground asserted for questioning his credibility was the delay in the bringing of the writ. This delay has been so satisfactorily explained that certainly no reasonable person could claim that it should be relied upon to question the credibility of petitioner.

The testimony of the petitioner is so consistent and sound, being unimpeached and undiscredited, that the trial court abused its judicial power in discarding his testimony as unworthy of belief because of his delay in bringing the proceedings, and his failure to call adverse witnesses not under his control.

THREE

The lack of jurisdiction of the armed forces over petitioner, resulting from his refusal to submit to induction by taking the oath, has not been waived.

It is unnecessary to discuss whether or not the armed forces have jurisdiction over a selectee who refuses to undergo "whatever ceremony or requirements of admission the War Deparment has prescribed". (*Billings* v. *Truesdell*, 321 U. S. 542, 549-550, 559) The *Billings* decision, after an exhaustive analysis of the Selective Training and Service Act, the Regulations promulgated thereunder and the Army Regulations, definitely held that one who had not taken the prescribed oath, as a part of the ceremony of induction, was not subject to the jurisdiction of the armed forces.

From December 1942 until sometime in 1943, when he had completed his service of the court-martial sentence, he did not waive his right to assert that the army did not have jurisdiction over him because of his refusal to submit to induction. Indeed, during that time neither he nor the armed forces had full knowledge of the law as to whether the army actually had legal jurisdiction over him. It is true that the army claimed jurisdiction in spite of his refusal to take the oath. Even judges, lawyers and army officers assumed that the army actually had jurisdiction in spite of his refusal to take the oath. *Billings* v. *Truesdell* (CCA-10) 135 F. 2d 505. Cf. *United States* v. *Smith*, 47 F. Supp. 607. See also *Smith* v. *Richart* (ED-SC) 53 F. Supp. 582; cf. *Smith* v. *United States*, 148 F. 2d 288. See also *Ex parte Yost* (DC-Cal.) 55 F. Supp. 768. Accordingly up until the time that Buice "deserted" everyone assumed that the army was correct in its claim that the law gave it military jurisdiction over Buice in spite of his refusal to submit to induction.

The claim that Buice made that he was not subject to military jurisdiction was not vindicated until March 1944

by the decision of the Surpeme Court of the United States in *Billings* v. *Truesdell,* 321 U. S. 542. At such time Buice was not in custody.

Prior to his "desertion", Buice did not have any knowledge of what his legal rights were. Being without knowledge and legal advice as to his rights before his "desertion", it cannot be said that during that time he waived his right to apply for the writ of *habeas corpus. Pence* v. *Langdon,* 99 U. S. 578, 581; *Provident Life Ins. Co.* v. *Hawley* (CCA-4) 121 F. 2d 429, 482; *Keehn* v. *Excess Ins. Co. of America* (CCA-7) 129 F. 2d 503, 506; *Smiley* v. *Barker* (CCA-9) 83 F. 684, 687; *Southern Ry. Co.* v. *Peple* (CCA-4) 228 F. 853, 859.

Buice did not waive his right to apply for the writ of *habeas corpus* because of his "desertion" from 1943 to 1945. Indeed, under the 1917 draft act the jurisdiction of the armed forces was permitted to be challenged in spite of the prior desertion of the prisoner. *Ver Mehren* v. *Sirmyer,* (CCA-8) 36 F. 2d 876.

It is significant that the trial court did not rely upon the "desertion" of Buice as ground for denial of the petition. Apparently the court considered his "desertion" to be of no significance. See opinion of the district court. [8]

Also the courts considered the testimony of Buice that he had gone through the infiltration course at Camp Edwards after his return to military custody after his apprehension to be of significance. His undergoing the infiltration course was considered among other things sufficient to constitute a waiver of his challenge to the jurisdiction of the armed forces by reason of his refusal to submit to induction. *Ex parte Yost* (DC-Cal.) 55 F. Supp. 768.*

* Cf. *Hibbs* v. *Catovolo* (CCA-5) 145 F. 2d 866, cert. den. 325 U. S. 854; *Mayborn* v. *Heflebower* (CCA-5) 145 F. 2d 864, cert. den. 325 U. S. 854. But see *United States ex rel. Phillips* v. *Downer* (CCA-2) 135 F. 2d 521; *United States ex rel. Beye* v. *Downer* (CCA-2) 143 F. 2d 125; *United States ex rel. Reel* v. *Badt* (CCA-2) 141 F. 2d 845; *United States ex rel. Hull* v. *Stalter* (CCA-7) 151 F. 2d 633.

The pleadings [4] as well as the evidence [8-11] conclusively show that Buice refused to wear the uniorm, obey orders, accept pay, make allotments, designate beneficiaries under the war risk insurance provisions, refused insurance and to do training except the taking of the infiltration course at Camp Edwards. Taking such course could not constitute a waiver of claimed absence of jurisdiction. Nor can it be argued that taking the course was voluntary. It was done undoubtedly according to orders. Failure to comply with orders would result in court-martial. In court-martial proceedings, it is within the discretion of the armed forces to assess the death penalty, See Article of War 64.* Obeying orders of the armed forces by taking the infiltration course, being under compulsion, could not constitute a waiver of legal rights. *Hartwell* v. *United States* (CCA-5) 107 F. 2d 359, 360; *United States* v. *Dashiel*, 3 Wall. 688, 697-702.

The conduct of Buice has been wholly consistent with his claim of the absence of jurisdiction of the armed forces since the day of his reporting at the induction station at Fort Sam Houston, Texas. His conduct is to be distinguished from that of persons who have voluntarily waived their right to complain of the want of jurisdiction of the armed forces.

Neither by delay in bringing the petition for writ of *habeas corpus* nor by his conduct has Buice waived his right to challenge the claimed jurisdiction of the armed forces by reason of his refusal to submit to the induction ceremony.

* Although not disclosed by the record, observe that subsequent to the hearing in the court below, Buice was charged with violation of Article 64, was tried by general court-martial and sentenced to serve five years at hard labor in a military prison.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under the Judicial Code and the Rules of this Court. To that end the petition for writ of certiorari should be granted so as to correct the assigned errors committed; and petitioner further prays that the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed and petitioner discharged, or, in the alternative, the judgments should be reversed and a new trial ordered.

Respectfully submitted,

ALFRED A. ALBERT

HAYDEN C. COVINGTON

Counsel for Petitioner

INDEX

CITATIONS

710354—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 323

JOE W. BUICE, PETITIONER

v.

COLONEL HOWARD S. PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 15–22) is reported at 155 F. 2d 429.

JURISDICTION

The judgment of the circuit court of appeals was entered May 20, 1946 (R. 22). The petition for a writ of certiorari was filed July 22, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether on petition for a writ of habeas corpus seeking petitioner's release from military custody the trial judge was justified in disbelieving petitioner's testimony that he was never actually inducted into the Army.

STATEMENT

On July 9, 1945, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts seeking his release from military custody on the ground that he had never taken the oath of induction and was therefore not within the jurisdiction of the Army (R. 2-5). In response to a Summons to Show Cause (R. 5-6) issued by the district court, respondent produced petitioner in court on the return day, July 30, 1945, and thereupon, without objection by petitioner, a hearing on the merits was had (R. 7, 8, 16).

The evidence adduced at the hearing was summarized in an agreed statement of facts upon which the appeal was heard and decided by the Circuit Court of Appeals for the First Circuit (R. 8-11). In summary, that statement shows that on examination by his counsel petitioner testified that he was a Jehovah's Witness and had been classified I-A under the Selective Training and Service Act of 1940 after claiming exemption as a minister of religion (R. 8-9); that in

response to an induction order he reported to his draft board on November 22, 1942, and was sent to Fort Sam Houston, San Antonio, Texas (R. 9); that while being physically examined "he told the heart doctor that he would refuse to serve in the Army and that he would refuse to take the oath because he was one of Jehovah's Witnesses and had been refused classification as a minister" (R. 9); that after being found physically fit and acceptable for general military service, and being called upon to take the oath "he went up to a desk and spoke to a non-commissioned officer, told him his name and said that he was going to refuse to take the oath. The non-commissioned officer said that they had been looking for him. They told him that there was nothing they could do and that whether or not he took the oath he was still in the Army. The oath was administered to the group, but though he was in the same room he stood aside from the rest of the group" (R. 9); that he did not sign any of the papers with respect to an allotment nor did he name any beneficiary or sign any other papers with the exception of one to the effect that he did not want any insurance (R. 9); that, as ordered, he returned to Fort Sam Houston on December 2, 1942, where he again "had conversation with the officer in charge to the effect that he was not subject to military jurisdiction and that he would not take the oath of induction. The officer, how-

ever, told him that he was in the Army" (R. 9); that thereafter he was assigned to a company but was not asked to do anything (R. 9); that he signed for a uniform but did not accept any pay from the Army, took no insurance, received no allotments, and at all times refused to work in any capacity whatsoever (R. 10); that he refused at various times to salute officers, take orders from Army authorities, or to fulfill various assignments given him (R. 9-10); that [probably late in 1942 or early 1943] he was sentenced by court martial to six months' imprisonment for refusal to obey an order of his commanding officer (R. 10); that after serving this sentence he was transferred to a camp at Aberdeen, Texas (R. 10); that "upon his arrival there he walked out of camp" and remained at liberty until his apprehension by the Federal Bureau of Investigation in June 1945 (R. 10). Upon cross examination petitioner admitted that while at one Army camp he went through an infiltration course involving military tactics and the use of firearms (R. 11). Respondent presented no witnesses and rested after cross-examining the petitioner (R. 11).

On August 1, 1945, the district court dismissed the petition and in a memorandum opinion stated that (R. 8): "The petitioner's story, coming at this late date and unsupported by other evidence, is not sufficient to warrant a finding that he was never inducted into the military service." On

appeal to the Circuit Court of Appeals for the First Circuit, the order was affirmed (R. 22).

In its opinion, the court below noted that while the procedure in the district court was unusual in that there was a hearing on the merits, with respect to the legality of the detention complained of, on the return of the Order to Show Cause instead of after the writ itself had issued and return thereon had been made (R. 16), it saw no reason why petitioner should be given another opportunity to litigate the merits, in the absence of objection by counsel for the petitioner at the time the hearing on the merits was had in the district court (R. 16–17). The court then concluded: (1) that the memorandum opinion of the district judge could not be construed as a ruling that petitioner's delay in instituting the habeas corpus proceedings constituted a waiver of his right to challenge the jurisdiction of the military authorities by this means, but rather as a finding by the trial judge that "Buice's uncorroborated testimony, in view of his delay in petitioning for a writ of habeas corpus, [was] insufficient to sustain the burden resting upon him to make it appear somewhat more probable than otherwise that he had never been formally inducted into the military service" (R. 19); (2) that under the Federal Rules of Civil Procedure now applicable to habeas corpus proceedings on appeal, it could not "set aside the findings of fact made by a

district court in a habeas corpus case unless, giving due regard to the opportunity had by the trial court to judge the credibility of the witnesses, its finding is clearly erroneous" (R. 19); and (3) that even though in some cases it would be clearly erroneous not to believe uncontradicted testimony "so many factors affect credibility that it is hard to conceive of a situation in which we could say that it was clearly erroneous for a trial court to disbelieve, or find insufficient, oral testimony, even if uncontradicted, given with respect to a basic issue by a party having the burden of persuasion" (R. 19–20). The opinion pointed out the several bases upon which the district judge would have been justified in disbelieving petitioner's testimony, such as his failure to bring habeas corpus in the three years which intervened from the date of his induction, during much of which time he had opportunity and reason to seek his release by such means (R. 20); "by the fact that after acceptance by the military authorities, and witnessing, at least, the administration of the oath of induction to the others in his group, he reported back to his induction station after furlough according to orders, that he signed for, was issued, and for a time apparently wore a uniform; and that at Camp Edwards after his arrest he made no objection to taking a course in military tactics involving the use of firearms" (R. 21).

ARGUMENT

The petition for a writ of certiorari urges that error was committed below in (1) dismissing the petition for a writ of habeas corpus, since a prima facie case entitling petitioner to the issuance of the writ was established both by the petition and petitioner's undisputed testimony (Pet. 13–18); (2) holding that the delay in seeking relief by way of a petition for a writ of habeas corpus and other circumstances relied on warranted dismissal of the petition (considering the case as though procedurally the hearing on the merits was proper) (Pet. 19–25); and (3) holding that petitioner had by his delay in seeking the writ waived the lack of jurisdiction of the Army (Pet. 8, 26–28). The last contention is without foundation since, as noted above, the circuit court of appeals stated that the trial judge's memorandum opinion could not be construed as a ruling that there had been a waiver (see p. 5, *supra,* and R. 19). As to the other arguments, we think the reasoned opinion of the court below amply demonstrates: (1) that petitioner was not prejudiced by the unorthodox procedure in the district court, in which he joined without objection,[1] and (2) that the trial judge,

[1] Even assuming, *arguendo*, that petitioner had established a prima facie case entitling him to issuance of the writ of habeas corpus and that the trial judge should not have held a full hearing on the merits until there had been a proper return and petitioner had an opportunity to file a traverse,

as the trier of facts, was entitled to disbelieve petitioner's story.

Petitioner argues (Pet. 8) that the judgment below is in direct conflict with the decisions in *Billings* v. *Truesdell,* 321 U. S. 542; *Ex parte Yost,* 55 F. Supp. 768 (S. D. Cal.), affirmed, *Lawrence* v. *Yost,* decided June 27, 1946 (C. C. A. 9); *United States* v. *Flint,* 54 F. Supp. 889 (D. Conn.); and *In re Herman,* 56 F. Supp. 733 (N. D. Tex.). In all these cases the petitions for a writ of habeas corpus were filed within a few days or months of the challenged induction. Here, however, petitioner delayed filing for three years, thereby rendering open to question his belated version of the induction. Petitioner's explanation of the delay, that he assumed prior to this Court's decision in the *Billings* case on March 27, 1944, that petitioning for a writ of habeas corpus would be futile, was properly not accepted by the court below because it found no "evidence in the record from which it could either be found or reasonably inferred that Buice was aware of the legal situation prevailing prior to the decision of the *Billings* case" (R. 21).

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petitioner was not prejudiced, since he is not precluded from filing another petition for a writ of habeas corpus and, on a proper hearing on the merits, adducing additional evidence, if available, sufficient to establish the illegality of his detention by the Army.

There are, moreover, other bases for not accepting petitioner's story. The trial judge might have disbelieved him because of his failure to explain why he reported at the induction station if he did not intend to submit to induction. It will be recalled that in 1942 the general practice for registrants who did not intend to submit to induction was flatly to refuse to go to the induction station. And it was only after the *Billings* decision that the practice of reporting for induction but refusing to be inducted first developed. Petitioner, however, prior to that decision, voluntarily reported at the induction station and at that time was inducted without the exercise by the induction station authorities of such force or duress as led to the conclusion, in the *Billings* case, that the induction was involuntary. Further doubt is cast upon petitioner's story by the fact that after his post-induction furlough, he voluntarily returned to Fort Sam Houston, in accordance with the orders he had received at the time of induction. Cf. *Ex parte Yost, supra,* where the petitioner, after refusing to take the oath, left the induction station and reported back to his local draft board that he had refused to take the oath and was not going to report back to the Army.

It is urged that the trial judge was bound to accept petitioner's testimony, since it was un-

contradicted (Pet. 21–24). But the fact that testimony is uncontradicted does not necessarily require its acceptance. This Court has said that:

> Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced.[2]

In the instant case, the circumstances were such that the trial judge properly disregarded petitioner's claim as inherently improbable. Apart from the possibility that the manner in which

[2] *Quock Ting* v. *United States*, 140 U. S. 417, 420–421; see also 9 Wigmore, *Evidence* (3d ed. 1940) sec. 2495, at p. 310.

petitioner testified may have given rise to doubts of his sincerity, his claim that he was not actually inducted was discredited by several patent omissions in his own account. Thus, he failed to explain why he reported for induction at a time when the prevailing practice on the part of those contesting military jurisdiction was to the contrary; he gave no reason for reporting back to the Army after his induction furlough; he did not claim or show that the induction was accomplished by force or that he made any protest or refusal other than to taking the oath; and he presented no adequate or convincing reason for his three-year delay in challenging the induction. Considering these collective circumstances together with the fact that had petitioner unequivocally resisted induction in 1942, he would have faced criminal prosecution for that refusal, now barred by the statute of limitations, it seems clear that the trial judge properly rejected petitioner's story as inherently improbable and merely a belated attempt to bring himself within the doctrine of the *Billings* case.

Two courts having found against petitioner on the facts, there is now no occasion for further review of the same facts by this Court.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the case turns on a determi-

nation of credibility made by the trial judge. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

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No 323

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

JOE W. BUICE, *Petitioner*

v.

COLONEL HOWARD S. PATTERSON ET AL.,
Respondents

□

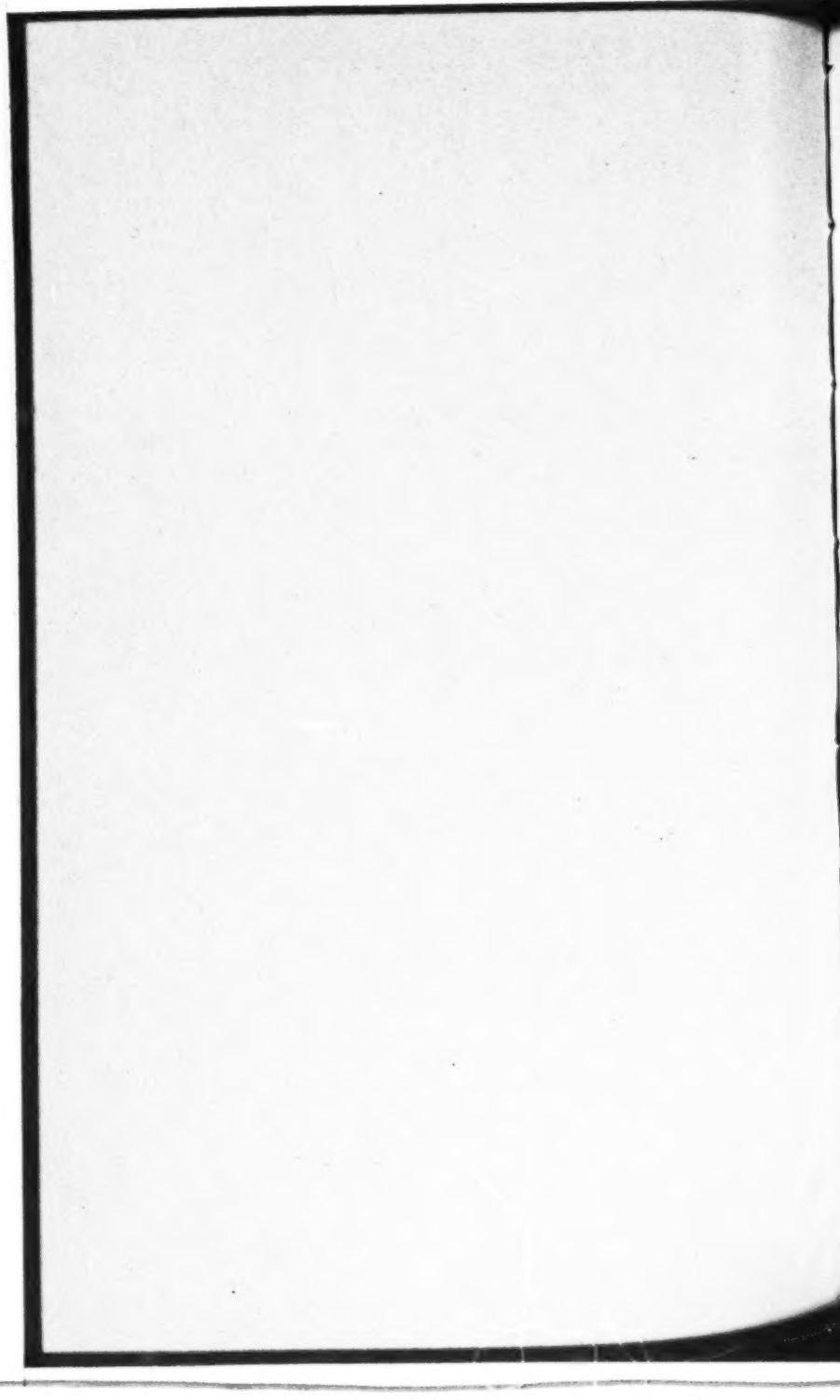
ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR BAIL
Pending Disposition of Writ of Certiorari

and

ALTERNATIVE MOTION
to Advance Cause for Argument and Submission

HAYDEN C. COVINGTON
Attorney for Petitioner



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

□

JOE W. BUICE, *Petitioner*

v.

COLONEL HOWARD S. PATTERSON ET AL.,
Respondents

□

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION FOR BAIL
Pending Disposition of Writ of Certiorari

and

ALTERNATIVE MOTION
to Advance Cause for Argument and Submission

TO THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Now comes Joe W. Buice, petitioner herein, and moves the court to admit him to bail pending the disposition of the writ of certiorari if, as and when granted.

He made motions to be admitted to bail to the trial court, to the circuit court of appeals, and to the Circuit

Justice. All said motions were denied. Presumably the Circuit Justice denied bail for want of jurisdiction under Rule 45 of the Rules of this court.

This motion is made to the Supreme Court of the United States under paragraph 4 of Rule 45 of the Rules of this court, which provides:

"4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

The "special reasons" for the granting of bail by this court are apparent upon the face of the petition for writ of certiorari. Reference is here made to the petition for the writ for such reasons.

The special reasons why this court should admit petitioner to bail under Rule 45 are, among others, plain. It will restore his liberty which was taken away from him by the illegal assumption of jurisdiction by the Army. If the judgment below is reversed and the case remanded for a new trial on which new trial he is discharged under the authority of *Lawrence* v. *Yost* (CCA-9, decided June 27, 1946), then his detention in custody pending hearing will be unjust. It is fundamental that to avoid injustice bail should be allowed where a substantial question is involved on an appeal. There is no way of restitution of the service of the illegal court-martial sentence. Therefore every reason inheres to give petitioner bail so he can get out from under the jurisdiction of the armed forces. Consequently it will be time enough for petitioner to serve his time in the Army when it is finally decided that the Army has jurisdiction over him. The Army will not lose by his being admitted to bail. He will lose much if he is not allowed bail.

Long before the present rule of this court allowing this court to grant bail for special reasons in habeas corpus cases it has been recognized that a habeas corpus court had authority, indeed the duty in some cases, to relieve a prisoner by releasing him on bond pending a review of an order remanding a prisoner.

"By the common law, upon the return of a writ of habeas corpus and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safekeeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of habeas corpus. Pending the hearing he may be bailed *de die in diem,* or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded." *Barth* v. *Case,* 12 Wall. 400-403.

Wright v. *Henkel,* 190 U. S. 40, 51, 63: "We are unwilling to hold that the circuit court possesses no power in respect to admitting to bail other than as specifically vested by statute, or that, where bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief."

In re Murphy (1898) CCD-Mass., 87 F. 549: "If the petitioner applies therefor, we will amend our order, and direct a writ to issue, with the expectation that, on its return, we will order the discharge of the writ, and thereupon consider any application that may be made for admitting to bail pending an appeal, if one is taken."

Re Moss (1904) 23 App. D. C. 474, where, prior to the

promulgation of the present rule, on refusal to discharge petitioner the district court denied bail, the court of appeals allowed bail saying: "If . . . bail be not allowed during the pendency of the appeal, the mere right of appeal, if such right exists for the cause alleged, would be without beneficial effect and valueless to the party. It would seem, therefore, eminently right and proper that the party should be admitted to bail during the pendency of the appeal, under Rule XI of this court, and an order will be signed accordingly."

In extradition cases the bail pending appeal has been allowed, even though the writ was discharged. *Ex parte Reggel* (1885) 114 U. S. 642; *Roberts* v. *Reilly* (1885) 116 U. S. 80.

Tinkhoff v. *Zerbst* (CCA-10) 80 F. 2d 464: Prisoner admitted to bail pending appeal of habeas corpus case, to get out and get his appeal fixed up. Order made by the Circuit Court of Appeals.

"Meanwhile the court has ample power to admit the alien to bail or to take his own recognizance [citing cases]." *Whitfield* v. *Hanges* (CCA-8) 222 F. 745, 756.

A habeas corpus court has jurisdiction to admit to bail in habeas corpus proceedings. *Mosorosky* v. *Hulbert,* 106 Ore. 274, 198 P. 556, 15 ALR 1076.

State ex rel, Syverson v. *Foster,* 84 Wash. 58, 146 P. 169, LRA 1915 E, 340.

Petitioner declares that there is no likelihood that he will abscond in event that the relief he requests is granted. He is a citizen of the United States and will continue to reside in the District of Massachusetts, there pursuing his ministerial activities until a final judgment is entered. There is no likelihood that he will violate any law during his qualified detention or enlargement. He has at all times proved to be a man of high character and a Christian gentleman.

WHEREFORE, for the special reasons stated petitioner prays that he be admitted to bail in the reasonable sum of $2,000 pending disposition of the writ of certiorari or, in the alternative, petitioner prays that the cause be advanced for argument and submission. Petitioner prays for such other and further relief to which he may show himself justly entitled.

JOE W. BUICE, *Petitioner*

By HAYDEN C. COVINGTON

His Attorney of Record

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 323

JOE W. BUICE, *Petitioner*

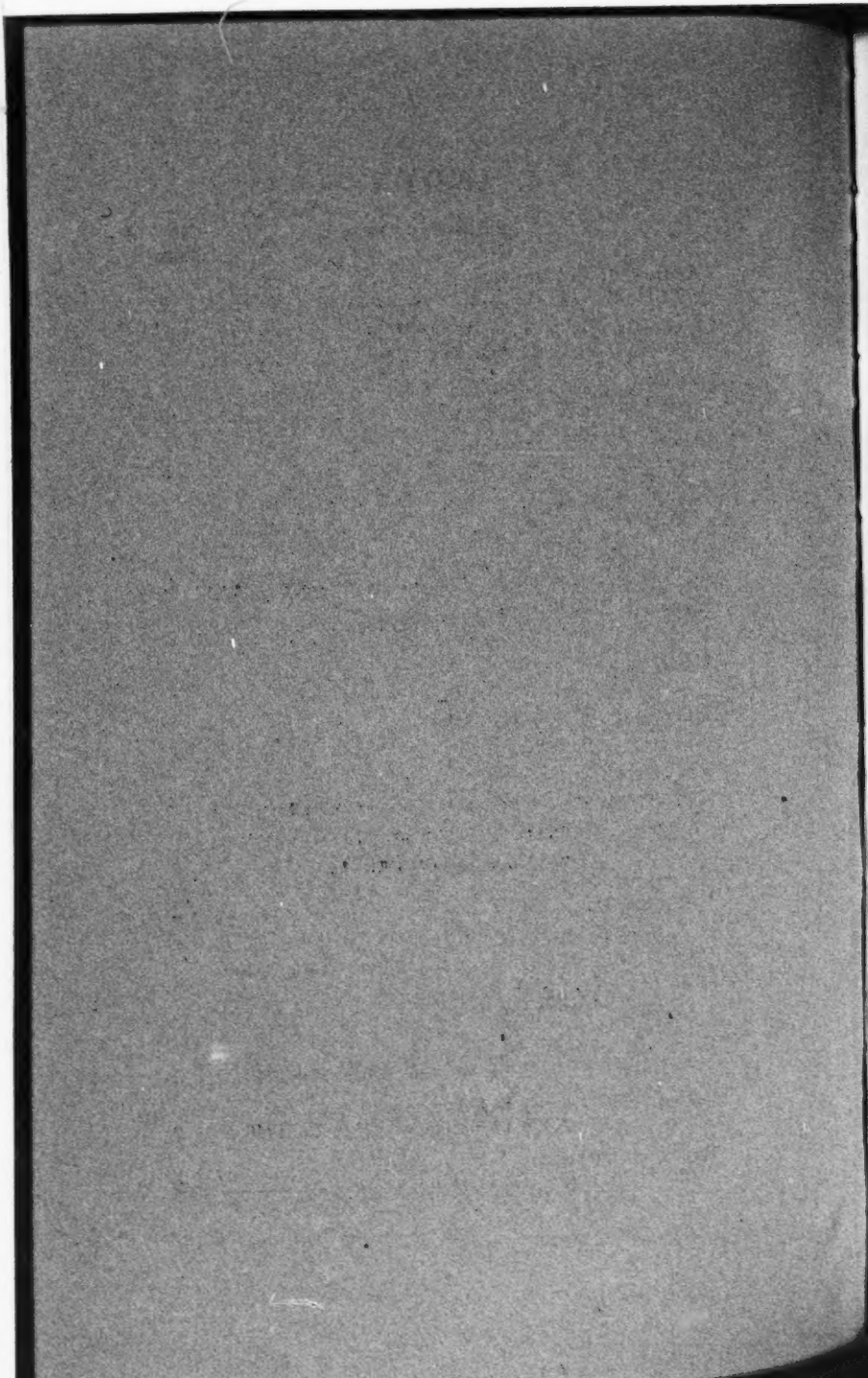
v.

COLONEL HOWARD S. PATTERSON ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner's
PETITION FOR REHEARING

ALFRED A. ALBERT
HAYDEN C. COVINGTON
Counsel for Petitioner



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CASES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 323

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COLONEL HOWARD S. PATTERSON ET AL.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioner's
PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

Within the time fixed by rules of court, petitioner files and presents this petition for rehearing. The court is requested to grant the same and order the petition for a writ of certiorari granted, for the reason that an important matter urged upon the court has been overlooked in arriving at its decision.

Grounds

ONE

This court committed error in refusing to grant the writ of certiorari for each and every one of the reasons stated in the petition for the writ.

TWO

This court committed error in refusing to review the decision of the court below because of the dangerous doctrine announced by the court below, that the undisputed testimony of the petitioner may be rejected and his petition for the writ of habeas corpus dismissed because of his interest in the outcome of the proceedings.

ARGUMENT

Discussion and Reasons Supporting Petition

The court is respectfully referred to the argument appearing in the brief supporting the petition, pages 13-28.

Moreover, the court's attention is directed to the fact that the decision of the court below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Lawrence* v. *Yost*, — F. 2d —, decided June 27, 1946. The Government, on substantially the same facts as those presented in this case, has failed to petition this court for a writ of certiorari. The decision in the *Yost* case stands unreviewed and in irreconcilable opposition to the holding of the court below in this case. Compare *United States* ex rel. *Kulick* v. *Kennedy* (CCA-2), — F. 2d —, decided October 29, 1946; also, opinion of LEARNED HAND, *C. J.*, delivered October 31, 1946, in *United States* v. *Balogh* (CCA-2).

Furthermore, the court below passed upon a substantial question of federal law, which has not been but which should

be decided by this court, when it ruled that the interest of th petitioner was sufficient to warrant dismissal of his petition for writ of habeas corpus, because his testimony was uncorroborated by other testimony. Testimony on the part of the petitioner was not discredited. It was not contradicted. It was not impeached. It was not improbable. There were witnesses who were available to the Government and who were not called to contradict the testimony of the petitioner.

It has been held that the testimony of a party is not to be discredited where it is uncontradicted, unimpeached, not improbable and there are witnesses who might be called to contradict his testimony in any particular. (*Rosseau* v. *Hollenbeck,* 1906, 97 N. Y. S. 394; *Rostron* v. *Rostron,* 1928, 49 R. I. 292; *Lacy* v. *Wilson,* 1872, 24 Mich. 479; *Matthews* v. *Lanier,* 1878, 33 Ark. 91; cf. *Andrew* v. *Goodale,* 85 N. H. 510.) "The rule invoked, it seems to us, ought not to be applied when the fact testified to is one which the opposing party is able, as in the case just referred to, to introduce testimony to contradict, and fails to do so." *Missouri K. & T. Ry.* v. *Stone,* 1910, 58 Tex. Civ. App. 480, 125 S. W. 587.

It has been held that a liberal presumption ought to be indulged in favor of the one party where the other party fails to produce evidence. (*Wetmore* v. *Rymer,* 169 U. S. 115) It is well settled that if a party fails to produce the testimony of available witnesses on a material issue, it may be inferred that the testimony of the witnesses, if presented, would be adverse to the party who fails to call the witness. *Mammoth Oil Co.* v. *United States,* 275 U. S. 13; *Graves* v. *United States,* 150 U. S. 118; *Culbertson* v. *The Southern Belle,* 18 How. (U. S.) 584; *The New York,* 3 Wheat. (U. S.) 54; *Stocker* v. *Boston & M. R. Co.,* 84 N. H. 377; *Bethlehem Steel Co.* v. *N. L. R. B.,* 74 App. D. C. 52, 120 F. 2d 641; *Tully* v. *Fitchburgh* R. Co., 1883, 134 Mass. 499.

The testimony of the petitioner is so consistent and

sound, being unimpeached and undiscredited, that the court below abused its judicial power in discarding his testimony as unworthy of belief because of his interest in the outcome of the proceedings, and for that reason affirming the judgment of conviction.

Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that upon due consideration the judgment of the court below be reversed and the cause remanded to the trial court for proceedings not inconsistent with the judgment and decision to be rendered herein.

Respectfully submitted,

HAYDEN C. COVINGTON
117 Adams Street
Brooklyn 1, New York

ALFRED A. ALBERT
148 State Street
Boston 9, Massachusetts

Counsel for Petitioner

November 1, 1946

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner